

ENDANGERED SPECIES GUIDANCE

A. Background

In order to meet its obligations under the Clean Water Act and the Endangered Species Act (ESA), and to promote the goals of those Acts, the Environmental Protection Agency (EPA) is seeking to ensure the activities regulated by this POTW general permit do not adversely affect endangered and threatened species and critical habitat. Applicants applying for permit coverage must assess the impacts of their wastewater discharges and discharge-related activities on Federally listed endangered and threatened species (“listed species”) and designated critical habitat (“critical habitat”), to ensure that those goals are met. Prior to obtaining general permit coverage, applicants must meet the ESA eligibility provisions of this permit. EPA strongly recommends that applicants follow the guidance in this Attachment at the earliest possible stage to ensure the notification requirements for general permit coverage are complete upon submission.

Applicants also have an independent ESA obligation to ensure that their activities do not result in any prohibited “takes” of listed species¹. Many of the measures required in this general permit and in these instructions to protect species may also assist in ensuring that the applicants activities do not result in a prohibited take of species in violation of section 9 of the ESA. If the applicant has plans or activities in areas where endangered and threatened species are located, they may wish to ensure that they are protected from potential takings liability under ESA section 9 by obtaining an ESA section 10 permit or by requesting formal consultation under ESA section 7. Applicants that are unsure whether to pursue a section 10 permit or a section 7 consultation for takings protection, should confer with the appropriate U.S. Fish and Wildlife Service (USFWS)² office or the National Marine Fisheries Service (NMFS), (jointly the Services).

The USFWS and NMFS have identified two species of concern, the short nosed sturgeon and the dwarf wedge mussel. These species are found in the Merrimack River and the Connecticut River. Specifically, the sturgeon is in the Connecticut River (main stem) downstream of Turners Falls, Massachusetts. It is in the Merrimack River (main stem) below the Essex Dam in Lawrence, MA.

The dwarf wedge mussel is located in the following areas:

1. The Connecticut River, North from Northumberland, NH south to Dalton, NH
2. Historic location in North Thetford, VT
3. Connecticut River, south and Black River: 16 -18 miles along the CT river from North Hartland, NH to Ascutney, VT as well as 1 mile along the Black River, from the river mouth to Springfield, VT
4. Ashuelot River from below Surry Mt. Dam, 6 -7 miles south to Keene, NH
5. South Branch of Ashuelot River, 0.5 miles in East Swanzey, NH
6. Mill River; approximately 5 miles in Whatley, MA and Hatfield, MA as well as 1-2 miles along Mill River Diversion in Northampton, MA

¹ Section 9 of the ESA prohibits any person from “taking” a listed species (e.g., harassing or harming it) unless: (1) the taking is authorized through a “incidental take statement” as part of completion of formal consultation according to ESA section 7; (2) where an incidental take permit is obtained under ESA section 10 (which requires the development of a habitat conservation plan); or (3) where otherwise authorized or exempted under the ESA. This prohibition applies to all entities including private individuals, businesses, and governments.

² Discharges to marine waters may require consultation with the National Marine Fisheries Service instead.

Any applicant seeking coverage under this general permit for a facility, which discharges to these rivers, must consult with the Services. EPA may designate the applicants as non-Federal representatives for the POTW general permit for the purpose of carrying out informal consultation with NMFS and USFWS. By terms of this POTW permit, EPA has automatically designated operators as non-Federal representatives for the purpose of conducting informal consultations. (See 50 CFR §402.08 and §402.13 and Part III.K.4.(b)). Permit coverage is only available if the applicant contacts the Services to determine that discharges are not likely to adversely affect listed species or critical habitat and informal consultation with the Services has been concluded and results in a written concurrence by the Services that the discharge is not likely to adversely affect an endangered or threatened species.

B. The ESA Eligibility Process

Before submitting a notice of intent (NOI) for coverage by this permit, applicants must determine whether they meet the ESA eligibility criteria by following the steps in Section “D” of this Attachment. Applicants that cannot meet any of the eligibility criteria, must apply for an individual permit.

C. The ESA Eligibility Criteria

The ESA eligibility requirements of this permit, may be satisfied by documenting that one or more of the following criteria has been met. Upon notification, EPA may direct an applicant to pursue eligibility under Criterion B.

Facilities eligible for coverage under the POTW General Permit are Publicly Owned Treatment Works and other treatment works treating domestic sewage. These facilities are referred to as “treatment works” in the remainder of this document.

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| Criterion A: | No endangered or threatened species or critical habitat are in proximity to the treatment works or the points where authorized discharges reach the receiving waters. |
| Criterion B: | <p>In the course of a separate federal action involving the treatment works, formal or informal consultation with the Fish and Wildlife Service and/or the National Marine Fisheries Service under Section 7 of the ESA has been concluded and that consultation</p> <ul style="list-style-type: none">- Addressed the effects of the wastewater discharges and discharge-related activities on listed species and critical habitat; and <p>The consultation resulted in either a no jeopardy opinion or a written concurrence by USFWS and/or NMFS on a finding that the wastewater discharges and discharge-related activities are not likely to adversely affect listed species or critical habitat.</p> |
| Criterion C: | <p>The activities are authorized under Section 10 of the ESA and that authorization addresses the effects of the wastewater discharges and discharge-related activities on listed species and critical habitat.</p> <p>(Eligibility under this criterion is not likely. This criterion involves an treatment works activities being authorized through the issuance of a permit under section 10 of the ESA and that authorization addresses the effect of the treatment work’s wastewater discharges and discharge-related activities on listed species and designated critical habitat. Treatment works must follow USFWS and/or NMFS procedures when applying for an ESA Section 10 permit (see 50 CFR §17.22(b)(1) for USFWS and §222.22 for NMFS). Application instructions for section 10 permits can be obtained by assessing the appropriate websites (http://www.fws.gov and http://www.nmfs.noaa.gov) or by contacting the appropriate regional office.)</p> |
| Criterion D: | Using the best scientific and commercial data available, the effects of the wastewater discharges and discharge-related activities on listed species and critical habitat have been |

evaluated. Based on those evaluations, a determination is made by the permittee and affirmed after review by EPA that the wastewater discharges and discharge-related activity will not affect any federally threatened or endangered species or designated critical habitat.

Criterion E: The wastewater discharges and discharge-related activities were already addressed in another operator's certification of eligibility which includes the treatment works activities.

D. The Steps To Determine if the ESA Eligibility Criteria Can Be Met

To determine eligibility, you must assess (or have previously assessed) the potential effects of your known wastewater discharges and discharge-related activities on listed species and critical habitat, PRIOR to completing and submitting a Notice of Intent (NOI). You must follow the steps outlined below and document the results of your eligibility determination.

Step1. Determine if You Can Meet Eligibility Criterion "A"

Criterion A. You can certify eligibility, according to Criterion A, for coverage by this permit if you can answer "No" to all of the following questions:

- Are there any Endangered Species in your county? Are there any Critical Habitats in your county?
- Are there any Endangered Species or Critical Habitat in proximity to your treatment works or discharge locations?

Use the guidance below to answer these questions, and to: "*Check for Listed Endangered Species in Your County*," "*Check for Critical Habitat in Your County*," and "*Check for Proximity to Your Treatment Works or Discharge Locations*."

If you answered "No" to the questions above, you have met ESA eligibility Criterion A. Skip to Step 4.

If you answered "Yes" to either of the questions above, Go to Step 2.

Check for Listed Endangered Species in Your County.

Look at the latest county species list to see if any listed species are found in your county. If you are located close to the border of a county or your treatment works is located in one county and your discharge points are located in another, you must look under both counties. Since species are listed and de-listed periodically, you will need the most current list at the time you are conducting your endangered species assessment.

Check for Critical Habitat in Your County.

Some (but not all) listed species have designated critical habitat. Exact locations of such habitat is provided in the endangered species regulations at 50 CFR part 17 and part 226. To determine if the treatment works or discharge locations are within designated critical habitat, you should either:

- Review those regulations (50 CFR Parts 17 and 226) that specific critical habitat. These regulations can be found in many larger libraries or via the Government Printing Office website, <http://www.access.gpo.gov>; or
- Contact the USFWS office. A list of USFWS offices for the areas of permit coverage is found in section "F" of this Attachment; or

- Contact the Natural Heritage Program for your state. Heritage programs gather, manage, and distribute detailed information about the biological diversity found within their jurisdictions. They frequently have the most current information on listed species and critical habitat. Contact information for the Heritage program is provided in section “G” of this Attachment.

Check for Proximity to Your Treatment Works or Discharge Locations.

You must determine whether listed species or critical habitat are in proximity to your wastewater discharges. Listed species and critical habitat are in proximity when they are:

- Located in the path or immediate area through which or over which wastewater flows from the treatment works to the point of discharge into the receiving water. This includes areas in the receiving water downstream from the point of discharge.
- Located in the immediate vicinity of, or nearby, the point of discharge into receiving waters.
- Located in the area of a treatment works where construction activities are planned.

The area in proximity to be searched/surveyed for listed species will vary with the size of the treatment works, the nature and quantity of the wastewater discharges, and the type of receiving waters. You should use the method(s) which allow you to determine, to the best of your knowledge, whether listed species are in proximity to your particular treatment works. These methods may include:

- Conducting visual inspections. This method may be particularly suitable for treatment works that are smaller in size or treatment works located in non-natural settings such as highly urbanized areas where there is little or no natural habitat. For other treatment works, a visual survey may not be sufficient to determine whether listed species are in proximity.
- Contacting the nearest State Wildlife Agency or USFWS offices. Many endangered and threatened species are found in well-defined areas or habitats. That information is frequently known to state or federal wildlife agencies.
- Contacting local/regional conservation groups such as natural heritage programs (see section G below). These groups inventory species and their locations and maintain lists of sightings and habitats.
- Conducting a formal biological survey. Some treatment works may choose to conduct biological surveys as the most effective way to assess whether listed species are located in proximity and whether there are likely adverse effects.

Step 2. Determine If You Can Meet Eligibility Criteria “B”, “C”, or “E”

Criterion B. You can certify eligibility, according to Criteria B, for coverage by this permit if you can answer “Yes” to all of the following questions:

- Has consultation, under ESA Section 7, already been completed for discharges from your treatment works³?

³ A formal or informal ESA Section 7 consultation on this or another federal action (e.g., New source review under NEPA, application for a dredge and fill permit under CWA Sec. 404, application for an individual NPDES permit, etc.) addressed the effects of your treatment works discharges and discharge-related activities on listed species and critical habitat. (See 50 CFR 402.13).

- Did the previously completed ESA Section 7 consultation consider all currently listed species and critical habitat and address your wastewater and discharge-related activities?
- Did the ESA Section 7 consultation result in either a “no jeopardy” opinion by the Service (for formal consultations) or a concurrence by the service that your activities would be “unlikely to adversely affect” listed species or critical habitat?
- Do you agree to implement all measures upon which the consultation was conditioned?

If you answered “Yes” to all four questions above, you have met ESA eligibility Criteria B. Skip to Step 4.

If you answered “No” to any of the four questions above, check to see if you can meet Criteria C or E, or Go to Step 3.

Criterion C. You can certify eligibility, according to Criterion C, for coverage by this permit if you can answer “Yes” to all of the following questions:

- Has an ESA Section 10 permit already been issued for discharges from your treatment works⁴?
- Does your ESA Section 10 Permit consider all currently listed species and critical habitat, and address your wastewater discharges and discharge-related activities for your treatment works?

If you answered “Yes” to the two questions above, you have met ESA eligibility Criteria C. Skip to Step 4.

If you answered “No” to either of the two questions above, check to see if you can meet Criteria E, or Go to Step 3.

Criterion E. You can certify eligibility, according to Criterion E, for coverage by this permit if you can answer “Yes” to all of the following questions:

- Did another treatment works operator previously certify ESA eligibility for your treatment works⁵?
- Did the other operator's certification of eligibility consider all currently listed species and critical habitat and address your wastewater and discharge-related activities?
- Do you agree to implement all measures upon which the other operator’s certification was based?

Before you rely on another operator's certification, you should carefully review that certification along with any supporting information. You also need to confirm that no additional species have been listed or critical habitat designated in the area of your treatment works since the other operator's endangered

⁴ You have a permit under section 10 of the ESA and that authorization addresses the effects of your wastewater discharges and discharge-related activities on listed species and critical habitat. You must follow USFWS procedures when applying for an ESA section 10 permit (see 50 CFR 17.22(b)(1)).

⁵ In order to meet the permit eligibility requirements by relying on another operator's certification of eligibility, the other operator's certification must apply to the location of your treatment works and must address the effects from your wastewater discharges and discharge-related activities on listed species and critical habitat.

species assessment was done. If you do not believe that the other operator's certification provides adequate coverage for your treatment works, you should provide your own independent endangered species assessment and certification.

If you answered “Yes” to all three questions above, you have met ESA eligibility Criteria E. Skip to Step 4.

If you answered “No” to any of the three questions above, Go to Step 3.

Step 3. Determine If You Can Meet Eligibility Criterion “D”

Criterion D. You can certify eligibility, according to Criterion D, for coverage by this permit if you can answer “Yes” to all of the following questions:

- Have you determined that your treatment works’ wastewater discharges and discharge-related activities are “not likely to adversely affect” listed species or critical habitat, and/or have you reached agreement with the USFWS on measures to avoid, eliminate, or minimize adverse affects?
- Do you agree to implement all measures upon which the determination was conditioned?

Use the guidance below to understand adverse affect determinations, and to answer these questions.

If you answered “Yes” to the both questions above, you have met ESA eligibility Criteria D. Go to Step 4.

If you answered “No” to either of the questions above you are not eligible for coverage by this permit. You must submit an individual application for your discharges to EPA. (See 40 CFR 122.33(b)(2))

If you are unable to certify eligibility under Criterion A, B, C, or E, you must assess whether your wastewater discharges and discharge-related activities are likely to adversely affect listed species or critical habitat. “Discharge-related activities” include: activities which cause, contribute to, or result in point source wastewater pollutant discharges; and measures to wastewater discharges and including the siting, construction, and operational procedures to control, reduce or prevent water pollution. Please be aware that no protection from incidental takings liability is provided under this criteria.

The scope of effects to consider will vary with each treatment works. If you are having difficulty in determining whether your treatment works is likely to cause adverse effects to a listed species or critical habitat, you should contact the appropriate office of the USFWS, or Natural Heritage Program for assistance. In order to complete the determination of effects it may be necessary to follow the consultation procedures in section 7 of the ESA. (See Criteria B information above, and section 7 consultation web link in section F below).

Upon completion of your assessment, document the results of your effects determination. If adverse effects are not likely, you are eligible under criterion “D” - proceed to Step 4 of this Attachment. Your determination may be based on measures that you implement to avoid, eliminate, or minimize adverse affects.

If the determination is “May Adversely Affect.” You must contact the USFWS to discuss your findings and measures you could implement to avoid, eliminate, or minimize adverse affects. If you and the service(s) reach agreement on measures to avoid adverse effects, you are eligible under criteria “D”. Any terms and/or conditions to protect listed species and critical habitat that you relied on in order to complete an adverse effects determination, must be incorporated into your Discharge Management Program (required by the permit) and implemented in order to maintain permit eligibility.

If endangered species issues cannot be resolved. If you cannot reach agreement with the USFWS on

measures to avoid, eliminate, or reduce adverse effects, and the likely adverse effects cannot be otherwise addressed through meeting the other criteria, then you are not eligible for coverage under this general permit. You must seek coverage under an individual permit.

Effects from wastewater discharges and discharge-related activities which could pose an adverse effect include:

- **Hydrological.** Wastewater discharges may cause siltation, sedimentation or induce other changes in receiving waters such as temperature, salinity or pH. These effects will vary with the amount of wastewater discharged and the volume and condition of the receiving water. Where a discharge constitutes a minute portion of the total volume of the receiving water, adverse hydrological effects are less likely.
- **Habitat.** Excavation, site development, grading, and other surface disturbance activities, including the installation or placement of wastewater treatment equipment may adversely affect listed species or their habitat. Wastewater associated with the treatment works operation may inundate listed species habitat.
- **Toxicity.** In some cases, pollutants in wastewater may have toxic effects on listed species.

Step 4. Submit Notice of Intent and Document Results of the Eligibility Determination.

Once the ESA eligibility requirements have been met, and you have determined NHPA eligibility (see Attachment C, you may submit the Notice of Intent (NOI). Signature and submittal of the NOI constitutes your certification, under penalty of law, of your eligibility for permit coverage.

You must include documentation of ESA eligibility in the Discharge Management Program required for the treatment works. Documentation required for the various ESA eligibility criteria are as follows:

Criterion A: A copy of the most current county species list pages for the county(ies) where your treatment works and discharges are located. You must also include a statement on how you determined that no listed species or critical habitat are in proximity to your treatment works or discharge locations.

Criterion B: A copy of the USFWS's biological opinion or concurrence on a finding of "unlikely to adversely effect" regarding the ESA Section 7 consultation.

Criterion C: A copy of the USFWS's letter transmitting the ESA Section 10 authorization.

Criterion D: Documentation on how you determined adverse effects on listed species and critical habitat were unlikely.

Criterion E: A copy of the documents originally used by the other operator of your treatment works to satisfy the documentation requirement of Criteria A, B, C or D.

E. Duty To Implement Terms and Conditions Upon Which Eligibility Was Determined

You must comply with any terms and conditions imposed under the ESA eligibility requirements to ensure that your wastewater discharges and discharge-related activities do not pose adverse effects or jeopardy to listed species and/or critical habitat. You must incorporate such terms and conditions into your treatment works' Discharge Management Program as required by the permit. If the ESA eligibility requirements of Part III.K.4 cannot be met, then you may not receive coverage under this permit, and must apply for an individual permit.

F. U.S. Fish and Wildlife Service Offices

National Websites For Endangered Species Information.

Endangered Species Home page: <http://endangered.fws.gov/>

ESA Section 7 Consultations: <http://endangered.fws.gov/consultations/index.html>

U.S. FWS Region 5

Division Chief, Endangered Species

U.S. Fish and Wildlife Service

ARD Ecological Services

300 Westgate Center Drive

Hadley, MA 01035-9589

Project Leader, USFWS

New England Field Office

22 Bridge Street, Unit #1

Concord, NH 03301-4986

G. National Marine Fisheries Services

Website: <http://www.nmfs.gov>

Regional Office

Protected Resource Program

National Marine Fisheries Service

Northeast Region

One Blackburn Drive

Gloucester, MA 01930

Protected Species Branch

NMFS

Northeast Fisheries Science Center

166 Water Street

Woods Hole, MA 02543

H. Natural Heritage Network

The Natural Heritage Network comprises 75 independent heritage program organizations located in all 50 states, 10 Canadian provinces, and 12 countries and territories located throughout Latin America and the Caribbean. These programs gather, manage, and distribute detailed information about the biological diversity found within their jurisdictions. Developers, businesses, and public agencies use natural heritage information to comply with environmental laws and to improve the environmental sensitivity of economic development projects. Local governments use the information to aid in land use planning.

The Natural Heritage Network is overseen by NatureServe, the Network's parent organization, and is accessible online at: http://www.natureserve.org/nhp/us_programs.htm, which provides website and other access to a large number of specific biodiversity centers.

Massachusetts Natural Heritage & Endangered Species Program

Division of Fisheries and Wildlife

Route 135

Westborough, MA 01581

508/792-7270

New Hampshire Natural Heritage Inventory

Department of Resources & Economic Development
172 Pembroke Street, P.O. Box 30370
Concord, NH 03302
603/271-3623